

REMARKS

This Amendment, filed in response to the Final Office Action mailed October 29, 2009, is believed to be fully responsive to all of the issues raised in the Action. Favorable reconsideration on the merits and allowance of the application are respectfully requested.

Applicants thank the Examiner for considering the Information Disclosure Statements filed on June 29, 2009 and August 30, 2009 and for returning an initialed copy of the PTO/SB/08 forms.

STATEMENT OF SUBSTANCE OF INTERVIEW

Applicants thank the Examiner for the telephonic interview conducted on December 16, 2009. As a statement of the substance of the interview, Applicants submit the following:

During the interview, the following was discussed:

1. Brief description of exhibits or demonstration: Claim Chart and Proposed Amendments to the Claims
2. Identification of claims discussed: All pending claims
3. Identification of art discussed: Seltzer and Zamietat
4. Identification of principal proposed amendments: See below
5. Brief Identification of principal arguments: See below
6. Indication of other pertinent matters discussed: None
7. Results of Interview: See below

During the interview, Applicants provided the Examiner with proposed amendments, which is included in the instant Amendment with minor editorial changes, which more clearly distinguishes the claimed subject matter from the cited references, Seltzer, Zamietat, and McCook. Applicants explained that the cited references fail to disclose or render obvious each and every step of the claimed process, and that the claimed process imparts distinct characteristics to the claimed aroma and extract final products. In addition, Applicants pointed to the specification, demonstrating the various enzyme characteristics imparted by the process of the present invention and explained that the claimed treated tea extracts of the present invention show increased amounts of the aromatic compounds when compared with un-treated tea extracts, as demonstrated in the specification.

The Examiner agreed such proposed amendments would obviate the cited references, with minor editorial changes, which are reflected in the above-presented claim amendments. The Examiner indicated that a new search based on the amended claims would be required.

It is respectfully submitted that the instant STATEMENT OF SUBSTANCE OF INTERVIEW complies with the requirements of 37 C.F.R. §§1.2 and 1.133 and MPEP §713.04.

It is believed that no petition or fee is required. However, if the USPTO deems otherwise, Applicants hereby petitions for any extension of time which may be required to maintain the pendency of this case, and any required fee, except for the Issue Fee, for such extension is to be charged to Deposit Account No. 19-4880.

Claim Status

Upon entry of the Amendment, which is respectfully requested, claims 32-47 will be pending.

In the Amendment, claims 32-43 are amended to more clearly set forth the subject matter of the present invention. Support for the amendment to claims 32-34 and 38-40 can be found in the specification, for example at page 11, line 25-page 12, line 5 and page 12, lines 22-26. Support for the amendments to claims 35-37 and 41-43 can be found in the specification, for example, at page 12, lines 6-21 and page 13, lines 1-4.

Response to Claim Objections

On page 2 of the Action, claims 32-43 are objected to because of the following informalities: Camellian sinesis is misspelled for the species Camellia sinesis.

Claims 32-43 have been amended to correct this typographical error. Accordingly, reconsideration and withdrawal of the claim objections is requested.

Response to Claim Rejections under 35 U.S.C. § 102

On page 2 of the Action, claims 32-45 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Seltzer et al. (US 2,927,860).

On page 3 of the Action, claims 32-45 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Zameitat et al. (US 3,438,785).

Applicants respectfully traverse. Seltzer and Zameitat fail to disclose or render obvious each and every element of the subject matter defined in the currently presented claims.

It is generally true that the patentability of a product does not depend on its method of production. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) ("If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process."). However, the structure implied by the process steps should be considered when assessing the patentability of product-by-process claims over the prior art, especially where the product can only be defined by the process steps by which the product is made, or where the manufacturing process steps would be expected to impart distinctive structural characteristics to the final product. See, e.g., *In re Garnero*, 412 F.2d 276, 279, 162 USPQ 221, 223 (CCPA 1979) (holding "interbonded by interfusion" to limit structure of the claimed composite and noting that terms such as "welded," "intermixed," "ground in place," "press fitted," and "etched" are capable of construction as structural limitations.")

The process steps recited in the claims of the instant application impart distinctive characteristics to the final product, i.e., tea, vegetables, fruit or flowers, as evidenced by the disclosure of the specification. The specification of the instant application describes test examples in which the claimed fresh Camellia sinesis tea leaf powder was tested for various enzyme activities contained therein, which shows that the conventional tea powder is measured to contain zero β -glucosidase, polyphenol oxidase, and lipoxygenase activity, while the claimed fresh tea leaf powder contains a significant amount of activity of all of the three enzymes, which are involved in the production of aroma compounds. (See pages 17 -20, Table 1, Table 2, and Table 3).

Furthermore, the specification discloses test examples wherein the tea extract, which is treated with the claimed fresh *Camellia sinensis* tea leaf powder, and an un-treated tea extract were tested and analyzed for their aroma intensity and taste (sensory evaluation) as well as analyzed for their aromatic compounds, which showed increased amounts of the aromatic compounds in the treated tea extracts. (See pages 33-36, Table A; and FIGS. 1 and 2). Therefore, based on the data provided, the chemical compositions of the claimed tea aroma are different from untreated tea aroma because of the actions of the enzymes contained in the claimed fresh *Camellia sinensis* tea leaf powder; and furthermore, the tea products produced by the Seltzer and Zamietat processes are different from the claimed extracts and aromas.

With regard to the Examiner's position that the process of obtaining *Camellia sinensis* tea leaf powder is not a positive recitation in the claim given the use of the phrase "obtainable", without conceding the merits of this rejection, the claims have been amended to replace the term "obtainable" with "obtained," rendering the rejection with regard to the term "obtainable" moot.

In view of the above, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 102 rejections of claims 32-43.

Response to Claim Rejections under 35 U.S.C. § 103

On page 4 of the Action, claims 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Seltzer et al. (US 2,927,860) or Zameitat et al. (US 3,438,785) as applied to claims 32-43 above, and further in view of McCook et al. (US 5,306,486 A).

Claims 32-43 are not subject to this rejection, therefore, claims 46 and 47, which depend, either directly or indirectly, from claims 32-43, are patentable for the same reasons that claims

32-43 are patentable as discussed above. Moreover, McCook does not make up for the deficiencies of Seltzer and Zameitat as discussed above.

In addition, the Examiner has failed to establish a *prima facie* case of obviousness. The Examiner concedes that both Seltzer and Zameitat fail to disclose a cosmetic comprising the tea extract and tea aroma with aroma or extracts of vegetable, fruit or flower. However, the Examiner relies on McCook to disclose the combination of green tea concentrate obtained from green leaves and water, followed by spray drying to obtain a green tea concentrate powder (see col. 2, lines 50-54) to be formulated into a sunscreen lotion (see col. 2, lines 19-27, 60-62). The Examiner asserts that McCook discloses the formulation further comprises extracts and aroma from avocado oil (see col. 4, line 28), which is considered to be a fruit, and sunflower oil (see col. 4, line 27) which is considered to be a flower plant.

The presently claimed subject matter is directed towards the production of tea, vegetable, fruit, and flower aromas, while Seltzer and Zameitat are directed towards making tea and tea extracts and McCook is directed towards sunscreen. In this regard, the Examiner has failed to establish why one of ordinary skill in the art would have combined the cited references in the manner asserted and is employing an impermissible hindsight analysis. In particular, the Examiner asserts that McCook's combination of green tea and sunscreen lotion compound can provide better ultraviolet radiation protection than either substance separately. Therefore, the Examiner alleges that it would have been obvious to one of ordinary skilled in the art to combine Seltzer's or Zameitat's tea powder with its' anti-oxidative and inactivation of free radicals properties with McCook's sunscreen lotion provide a more effective sunscreen system. However, the Examiner fails to realize that the present invention is not concerned with the "anti-

oxidative” and “free radical inactivation” properties of green tea in sunscreen lotion. Therefore, it is clear that the invention defined in the claims is not rendered obvious by Seltzer or Zameitat in view of McCook. Nevertheless, in order to advance the prosecution and more clearly distinguish the claimed subject matter from the teachings of the cited references, claims are amended as discussed above.

Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103 rejection of claims 46 and 47.

In view of the above, reconsideration and allowance of this application are now believed to be in order, and such actions are hereby solicited. If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly requested to contact the undersigned at the telephone number **202-775-7588**.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,

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